(24)

No. 91-615

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ALLIED-SIGNAL INC.
as successor in interest to
The Bendix Corporation,
Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF THE FINANCIAL INSTITUTIONS STATE TAX COALITION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Philip M. Plant
Counsel of Record
799 Market Street
San Francisco, CA 94103
(415) 622-2877

Michael G. DeAngelis
Haskell Edelstein
Michael J. Folz
FINANCIAL INSTITUTIONS
STATE TAX COALITION

Counsel for Amicus Curiae
April 10, 1992

18

QUESTION PRESENTED

Irrespective of whether this Court overrules ASARCO, Inc. v. Idaho State Tax Comm'n., 458 U.S. 307 (1982) and F.W. Woolworth Co. v. Taxation and Revenue Dep't., 458 U.S. 354 (1982), what constitutional principles should govern state taxation of corporations doing business in several states, in order to protect corporations engaged in interstate commerce from overlapping and conflicting state taxation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

Page(s)

STATUTES:

UNIFORM LAWS:

No. 91-615

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ALLIED-SIGNAL INC.
as successor in interest to
The Bendix Corporation,
Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF THE FINANCIAL INSTITUTIONS STATE TAX COALITION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Financial Institutions State Tax Coalition (hereinafter the "Coalition") hereby respectfully submits this brief as amicus curiae in support of the Petitioner in the above captioned matter. The written consent of both of the parties has been obtained and filed with the Clerk of this Court.

The Coalition is an ad hoc committee comprised of a cross-section of financial institutions and financial service

providers throughout the United States[1] that are engaged in multistate financial services businesses. The Coalition was organized to promote and support equitable and nondiscriminatory state tax policies governing multistate financial institutions and financial services providers. The Coalition's members are directly affected by state taxation of interstate operations.

The Coalition respectfully submits this brief in response to the Court's invitation of amici to address constitutional principles in the event ASARCO and Woolworth are overruled. The Coalition urges this Court to enunciate constitutional principles that will protect taxpayers from the threat of multiple taxation arising from the Allied-Signal decision. These principles are of tremendous importance to the commercial banking and financial services industries.

SUMMARY OF THE ARGUMENT

If this Court overrules ASARCO and Woolworth, it should be recognized that dividends and gains from stock investments can only be taxed on an apportioned basis

---

[1]The Coalition's members include: Bank of America NT&SA; The Bank of New York Company, Inc.; Capital Holding Corporation; The Chase Manhattan Bank, N.A.; Citicorp/Citibank, N.A.; Dean Witter Financial Services Group Inc.; First Chicago Corporation; First Interstate Bancorp; KeyCorp; Morgan Guaranty Trust Company of New York; NationsBank; Security Pacific Corporation; and Wachovia Corporation.

consistent with the Commerce Clause if they are business income as defined by the Uniform Division of Income for Tax Purposes Act, 7A Uniform Laws Annotated 331 (West 1985), §1(a). This Court should further rule that no state can constitutionally allocate and tax 100 percent of such dividends and gains.

In any case, this Court should make clear that sourcing rules governing all items of business income should be consistent with the activities producing such income. In that regard, apportionment formulas that largely disregard income-producing activities (viz., capital and labor) and that focus disproportionately upon sales according to customer location are unconstitutional. Such formulas, which have become more common since Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978), discriminate against multistate business in violation of the Commerce Clause. In order to protect interstate commerce from such multiple taxation, this Court should overrule Moorman.

ARGUMENT

I. IRRESPECTIVE OF WHETHER ASARCO AND WOOLWORTH ARE OVERRULED, THIS COURT SHOULD HOLD THAT MULTIPLE TAXATION BY STATES IS UNCONSTITUTIONAL.

A. THIS CASE HIGHLIGHTS THE PREVALENT RISK OF MULTIPLE STATE TAXATION OF MULTISTATE BUSINESSES.

The Allied-Signal case is a clear example of the risk of multiple taxation borne by multistate businesses. The risk is that different states, with divergent and conflicting rules for allocating and apportioning income, will together subject the income of the business to multiple taxation. In deciding this case, this Court should protect interstate commerce from this "parochial hodgepodge of overlapping and conflicting tax levies" (ASARCO, 458 U.S. at 331 (O'Connor, J., dissenting)).

This case brings into focus the conflicts between taxing rules of the various states where a multistate taxpayer does business. If the nondomiciliary state is allowed to tax capital gain upon sale of stock as apportionable business income, what would prevent the domiciliary state from taxing all of the same gain as allocable nonbusiness income? Even if the domiciliary state taxes the capital gain as apportionable business income, what protection does a multistate business have against multiple state taxation arising from inconsistent apportionment formulas in the states where it is taxable? These conflicts would be exacerbated if the definition of

apportionable income is expanded, as New Jersey seeks to do in the present case.

Although the Coalition expresses no opinion as to whether ASARCO and Woolworth should be overruled, we urge this Court to enunciate constitutional principles to guard against multiple state taxation in any event.

B. IF ASARCO AND WOOLWORTH ARE OVERRULED, DIVIDENDS AND GAINS ON SALE OF STOCK SHOULD NOT BE HELD SUBJECT TO NONDOMICILIARY STATE TAXATION ON AN APPORTIONED BASIS UNLESS SUCH INCOME CONSTITUTES BUSINESS INCOME.

If ASARCO and Woolworth are overruled, dividends and gains (or losses) on sale of stock[2] should be taxed on an apportioned basis by nondomiciliary states that have jurisdiction over the recipient corporation, only if the

---

[2]Dividends from stock and gains and losses on sale of stock should be treated consistently for this purpose. Each of these items represents a return on the investment in the stock, differing only in the timing of when income and gains or losses are realized and distributed by the underlying corporation. See ASARCO, 458 U.S. at 330.

acquisition, management, and disposition of that stock constitute integral parts of the taxpayer's regular trade or business operations.[3] This constitutional rule should apply regardless of whether the activities of the corporation that issued the stock formed part of the recipient's unitary business (provided, however, such dividend, gain or loss may otherwise be eliminated under rules applicable to combined reports of unitary groups).

If such dividends, gains or losses are treated as business income subject to apportionment, they should be sourced as receipts for purposes of the apportionment formula to the location where the taxpayer manages the stock investment. If intangible property is included in the apportionment formula, the stock should be similarly sourced for purposes of the property factor. These sourcing rules are consistent with the rationale for business income treatment and properly reflect how the income is generated. See Container Corp. of America v. Franchise Tax Board, 453 U.S. 159, 169 (1983).

In addition, no state should constitutionally be permitted to allocate and tax 100 percent of such dividends and gains that are properly taxed on an apportioned basis by

---

[3]This standard is derived from §1(a) of the Uniform Division of Income for Tax Purposes Act, supra.

other states where the recipient is taxable. This rule will help to protect multistate businesses from multiple taxation of apportionable income. See Mobil Oil Corp. v. Comm'r. of Taxes of Vermont, 445 U.S. 425, 443-445 (1980). While we realize that the adoption of such a rule is contrary to dictum in Moorman, 437 U.S. at 279, for the reasons set forth below, both this dictum and the holding in Moorman merit reexamination.

C. MULTIPLE TAXATION ARISING FROM DISCRIMINATORY APPORTIONMENT FORMULAS OF NONDOMICILIARY STATES IS UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE.

1. Aggressive Efforts By States To Shift Tax Burdens To Nondomiciliary Businesses Highlight The Need To Overrule Moorman.

In Moorman, this Court upheld Iowa's use of a single-factor sales formula against constitutional challenge. The taxpayer was an Illinois manufacturer whose products were sold to customers in Iowa and other states. The taxpayer -- subject to tax in Illinois under a three-factor apportionment formula -- contended that Iowa's single-factor formula resulted in taxation of a greater portion of its income than was reasonably attributable to its business in the state.

In upholding Iowa's single-factor formula against the taxpayer's Commerce Clause challenge, this Court held that the taxpayer had the burden of proof that application of a particular apportionment formula produces duplicative taxation and failed to meet that burden[4]. This Court declined to endorse the generally prevailing three-factor formula as a uniform rule for the division of income. Instead, this Court observed that "[i]t is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income." 437 U.S. at 280.

Many states have relied upon the holding in Moorman to justify shifting state tax burdens from local businesses to nondomiciliary businesses. As noted infra, single-factor sales formulas operate to tax income of out-of-state businesses disproportionately to business transacted within and without the state. The single-factor sales formula, used by Iowa and upheld in Moorman, is no longer a curious anomaly, but is

---

[4]The taxpayer in Moorman also raised a due process argument claiming that Iowa's formula resulted in extraterritorial taxation. This Court ruled against the taxpayer on this issue holding that the taxpayer had failed to impeach formula apportionment through separate accounting. Notwithstanding the suggestion in footnote 9 of the opinion that such a showing might be possible, (437 U.S. at 275-6), no taxpayer has ever been successful before this Court attacking a state net income or franchise tax on these grounds since the 1931 decision in Hans Rees' Sons v. North Carolina, 283 U.S. 123 (1931).

instead a growing threat to multistate businesses that provide products or services from the home state to customers in many states.[5] Other states have aimed at the same result by increasing the weight of the sales factor in the standard apportionment formula of property, payroll, and sales.[6] In the past fourteen years since Moorman, Congress has failed to enact any uniform rules.

The growing burden upon interstate commerce from such multiple taxation warrants further action by this Court. This Court need not promulgate comprehensive uniform rules of multistate taxation as it rightly declined to do in Moorman. Instead, this Court should address the problem of multiple taxation by invalidating apportionment formulas that disregard the fact that capital and labor are major income producing activities.

---

[5]At least 6 states now utilize a single-factor apportionment formula applicable to various types of financial and/or non-financial businesses. See, e.g., Ga. Code Ann. §48-7-31(d)(1)(B); Ind. Code §6-5.5-2-4; Neb. Rev. Stat. §77-2734.05; S.C. Code Ann. §12-7-1190; Tenn. Code Ann. §67-4-815; and W.Va. Code §11-24-7b(b)(4)(A).

[6]See, e.g., Ariz. Rev. Stat. Ann. §43-1139; Conn. Gen. Stat. §12-218; Fla. Stat. §220.15(4); Ill. Rev. Stat. Ch. 120, §3-304(a); Ky. Rev. Stat. Ann. §141.120(8); Me. Rev. Stat. Ann. tit. 36, §5211.8; Mass. Gen. L. Ch. 63, §38(c); Mich. Stat. Ann. §208.45; Minn. Stat. §290.191.3; N.H. Rev. Stat. Ann. §77-A:3,I and §77-A:3,II(a); Ohio Rev. Code Ann. §5733.05(B)(2); Or. Rev. Stat. §314.650 and Wis. Stat. §71.25(6).

2. **Apportionment And Sourcing Rules That Look Primarily Or Solely To The Destination Of Sales And Disregard The Location Of Other Income-Producing Activities Are Unconstitutional Under The Commerce Clause.**

In Moorman, this Court observed that the Commerce Clause "is neutral with respect to the content of any uniform rule" for the division of income. 437 U.S. at 279. This neutrality, however, must not override the constitutional prohibitions of unfair apportionment and discrimination against interstate commerce set forth in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). Thus, although the Commerce Clause does not define the ideal uniform rule for the division of income, it must be read to disapprove certain formulas that promote multiple and discriminatory tax burdens by disregarding fundamental income-producing activities outside the state.

A state must apportion unitary business income "on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction." Container, 463 U.S. at 164-65. An apportionment formula that largely or entirely disregards the location of capital and labor, and focuses primarily or solely upon sales according to customer location, discriminates in favor of local businesses with out-of-state sales and against out-of-state businesses with in-state sales. Such a formula

apportions a greater percentage of income of out-of-state businesses and a smaller percentage of the income of local businesses than does a three-factor formula that gives equal weight to property and payroll.[7] It is precisely this discriminatory impact that the Commerce Clause prohibits.

---

[7]The three-factor formula, by contrast, reflects a "very large share" of the income producing activities. Container, 463 U.S. at 183; Trinova Corp. v. Michigan Treasury Dept., 111 S.Ct. 818, 112 L.Ed. 2d at 911 (1991).

CONCLUSION

As the above argument points out, this Court should articulate principles to ensure that multistate businesses are not subjected to multiple and discriminatory state taxation.

Respectfully submitted,

Philip M. Plant
Counsel of Record
799 Market Street
San Francisco, CA 94103
(415) 622-2877

Michael G. DeAngelis
Haskell Edelstein
Michael J. Folz
FINANCIAL INSTITUTIONS
STATE TAX COALITION
Counsel for Amicus Curiae

April 10, 1992